

## **The JOBS Act: SEC Guidance on the Confidential Submission Process**

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H.R. 3606, also known as the Jumpstart Our Business Startups Act (JOBS Act), was signed into law on April 5, 2012. Since its enactment, the Division of Corporate Finance (the Division) of the Securities and Exchange Commission (the Commission) has provided guidance on the implementation and application of the JOBS Act in light of its existing rules, regulations and procedures. This *Client Alert* is the first in a series of alerts summarizing such guidance.

On April 10, 2012, the Division addressed frequently asked questions related to the confidential submission of registration statements for review pursuant to new Section 6(e) of the Securities Act of 1933 (the Securities Act). Section 6(e) provides that an emerging growth company may submit a draft registration statement for confidential, nonpublic review by the Commission prior to public filing, as long as the confidential submission and all amendments thereto are publicly filed within 21 days of the company's road show. The JOBS Act defines an "emerging growth company" as any issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year. The following is a summary of the Division's current understanding of the confidential submission process:

### **Applicability of the Confidential Submission Process**

An emerging growth company may submit a draft registration statement for confidential, nonpublic review prior to its initial public offering date. Section 101(c) of the JOBS Act defines the initial public offering date as the date of the first sale of common equity securities<sup>1</sup> of an issuer pursuant to an effective registration statement. The first

sale is not limited to the company's initial primary offering of common equity securities for cash, and includes offerings of common equity pursuant to an employee benefit plan registered on Form S-8 as well as a selling shareholder's secondary offering registered on a resale registration statement.

A foreign private issuer can also use the confidential submission process if it qualifies as an emerging growth company. A foreign private issuer that is not an emerging growth company may be eligible to use the confidential submission process if it meets the requirements set forth in the Division's policy on nonpublic submissions from foreign private issuers.

Further, the confidential submission process is only applicable to the Securities Act registration process, so it is not available for Form 10 or Form 20-F registration statements filed pursuant to the Securities Exchange Act of 1934.

### **Draft Registration Statement Requirements**

The draft registration statement does not need to be submitted under cover of a Rule 83 request in order to preserve confidentiality. The Commission's Rule 83 provides a procedure by which persons submitting information may request that it be withheld when requested under the Freedom of Information Act. Additionally, the submission of a draft registration statement does not trigger the Securities Act registration filing fee. This fee is not due until the registration statement is first filed publicly on EDGAR.

Section 6(e) does not specify what needs to be included in a draft registration statement. Since the confidential submission of the draft registration statement is not a filing for purposes of the Securities Act, it does not need

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<sup>1</sup> The confidential submission process is also available to companies that have had registered sales of securities other than common equity securities, as long as such company otherwise qualifies as an emerging growth company.

to be signed or include the consent of auditors or other experts. Additionally, the draft registration statement may omit certain information related to the offering, such as the public offering price. However, the draft registration statement should be substantially complete at the time of initial submission and include a signed audit report of the registered public accounting firm covering the fiscal years presented in the registration statement.

### **Public Filing of the Draft Registration Statement**

Section 6(e) requires emerging growth companies to publicly file any draft registration statements submitted to the Commission at least 21 days before a road show. Each draft registration statement should be filed as a separate exhibit to the first registration statement on EDGAR. If an emerging growth company does not conduct a traditional road show, then its registration statement and any confidential submissions should be publicly filed on EDGAR no later than 21 days before the anticipated date of effectiveness of the registration statement. The Division has stated that any “test-the-waters” communications with qualified institutional buyers and institutional accredited investors pursuant to new Section 5(d) of the Securities Act will not be classified as a road show for the purpose of determining when the draft registration statements must be publicly filed.

A company that was in registration at the time of the enactment of the JOBS Act may switch to the confidential submission process for future amendments rather than withdrawing the registration statement and submitting a

new draft registration. However, any prior filings will not satisfy the public filing requirements of Section 6(e) and such companies must still publicly file any draft registration statements at least 21 days before it conducts a road show.

### **Interaction with Securities Act Rules**

Since the submission of a draft registration statement does not constitute the filing of a registration statement, an emerging growth company using the confidential submission process cannot take advantage of the Securities Act Rule 134 safe harbor, which permits an issuer to publish public notices containing information about an offering after a registration statement is filed without filing such notices with the Commission. Additionally, the confidential submission process does not count as the filing of a registration statement for the purposes of the prohibition in Section 5(c) against making offers of a security in advance of filing a registration statement.

For the full text of the frequently asked questions, please click [here](#).

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:*

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